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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 533

DUPARQUET HUOT & MONEUSE CO., E. E. ALLEY CO., INC., AND H. B. DAY CO., INC.,

Petitioners,

vs.

FRYSINGER EVANS, DU-WEL CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC., AND GRAMERCY QUALITY LAUNDRY CO., INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HAROLD HARPER,
MARK M. HORBLIT,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 533

IN THE MATTER OF 2168 BROADWAY CORPORATION,
Debtor;

DUPARQUET HUOT & MONEUSE CO., E. E. ALLEY CO., INC., AND H. B. DAY CO., INC.,
Petitioners,

vs.

FRYSINGER EVANS, DU-WEL CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC., AND GRAMERCY QUALITY LAUNDRY CO., INC.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., and H. B. Day Co., Inc., for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit alleges:

By its judgment of July 22, 1935 (R. 34), the Circuit Court of Appeals has affirmed the order of the District

Court for the Southern District of New York, made May 13, 1935, by Hon. John C. Knox, District Judge (R. 20-22), which dismissed as insufficient in law the petition for the reorganization under § 77B of the Bankruptcy Act of 2168 Broadway Corporation, a debtor.

The petitioners below, who now petition for certiorari, were three (3) unsecured creditors of the debtor who had provable claims amounting in the aggregate to more than $1,000 (R. 1-3). Their petition alleged that the debtor, during the six months preceding, had had its principal place of business in the Southern District of New York, that it was unable to meet its debts as they matured, and that petitioners proposed that the debtor should effect a reorganization under § 77B (R. 4-5).

The petition in the District Court also alleged the following facts:

On October 15, 1934, an action was commenced in the New York Supreme Court, by Gertrude C. Buttenweiser against the debtor, to foreclose for default in payment of interest a mortgage in the principal sum of $42,500 on the property of the debtor. The mortgage had matured on September 19, 1934. On December 19, 1934, by order of the New York Supreme Court, receivers were appointed. They entered into possession of the property, and were receiving and administering the income therefrom for the benefit of the plaintiff. The receivership was in full force and effect (R. 4).

The petition further alleged that the debtor maintained and operated on the premises the hotel, Manhattan Towers (R. 6); that the total value of the debtor's assets exceeded the total amount of its liabilities, but that said value could not be immediately realized without great sacrifice (R. 5). "Its only property is being administered by receivers in the foreclosure action hereinbefore mentioned" (R. 6).

The petition alleged that other creditors of the corporation were pressing, that the debtor was in arrears in New York municipal taxes approximating $260,000 (R. 6); that the debtor's business was in serious danger of great deterioration and loss by virtue of the pending foreclosure action and pressure of other creditors, and that if a plan of reorganization could be effected it would result in a great saving of the assets of the debtor, which would redound to the benefit of the creditors and stockholders (R. 6). The petition alleged that if the debtor's assets were safely conserved and managed, they would ultimately be sufficient to satisfy all creditors in full; that it was essential for the protection of stockholders and creditors that a forced liquidation be avoided and that creditors be restrained from prosecuting their claims except under the 77B proceeding (R. 7); that such a liquidation would be accomplished if said foreclosure action should result in a sale pursuant to the judgment to be obtained in that action; that the property if sold at this time would bring but little to the estate because of the present depression in the real estate market; that the debtor's property formerly secured a mortgage in the amount of $1,650,000 and that its assessed valuation exceeded $1,500,000 (R. 7). A schedule annexed to the petition, which only purported to be an approximation, showed assets of $1,500,000 and liabilities of $392,385.04 (R. 12).

The petition in the district court did not allege that the debtor had committed an act of bankruptcy within four months, nor that a prior proceeding in bankruptcy was pending. It did allege that the debtor's property was in custody of receivers appointed by the state court in a suit in equity to foreclose a mortgage. The sole question presented is whether this constituted an "equity receivership • • • pending," which is an alternative requirement of § 77B.

QUESTION.

Whether custody of the debtor's property by receivers appointed by the State court in an action to foreclose a mortgage is a pending equity receivership under Section 77B.

The district court in dismissing the petition and the Circuit Court of Appeals in affirming its order have held that such a foreclosure receivership in the State court is not the required "equity receivership * * * pending." This application seeks to review that question.

The Circuit Court of Appeals for the Seventh Circuit *In the Matter of Granada Hotel Corporation, debtor,* 78 F. (2d) 409, has held that a mortgage foreclosure receivership in the State court is such an equity receivership, said decision having been rendered on June 5, 1935 (re-hearing denied July 26, 1935). That decision is the subject of an application now pending for certiorari from this Court to the Seventh Circuit Court of Appeals (No. 428).

STATUTE.

The portions of § 77B of the National Bankruptcy Act as amended that are material are as follows:

> "(a) * * * Three or more creditors who have provable claims against any corporation which amount in the aggregate, in excess of the value of securities held by them, if any, to $1,000 or over may, if such corporation has not filed a petition or answer under this section, file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature and, if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months, that such creditors propose that it shall effect

a reorganization; and such corporation shall, within ten days after the service of a copy of such petition upon it, answer such petition. * * *"

"(i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, whether before or after June 7, 1934, at 12 o'clock noon a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee."

REASONS FOR GRANTING CERTIORARI.

The reasons for granting certiorari in this case are:

(1) The question is of public importance. The necessary effect of the decision below is to exclude from relief and reorganization under § 77B of the Bankruptcy Act at the instance of creditors practically all corporations the activities of which are limited to holding or operating real estate, since in the case of such corporations the receivership which accompanies financial distress is almost invariably a foreclosure receivership.

(2) There is a direct conflict between the decision of the Second Circuit Court of Appeals below, which holds that a foreclosure receivership is not an "equity receivership" within the meaning of the statute, and the decision of the Circuit Court of Appeals for the Seventh Circuit in *In re*

Granada Hotel Corporation, debtor (June 3, 1935) 78 F. (2d) 409, which holds that such a foreclosure receivership is an "equity receivership."

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "In the Matter of 2168 Broadway Corporation, Alleged Debtor, Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., and H. B. Day Co., Inc., Appellants," and that the said judgment of the said court may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

Dated, New York, October 15, 1935.

DUPARQUET HUOT & MONEUSE CO.,
E. E. ALLEY CO., INC., AND
H. B. DAY CO., INC.,
By HAROLD HARPER,
MARK M. HORBLIT,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 533

IN THE MATTER OF 2168 BROADWAY CORPORATION,
Debtor;

DUPARQUET HUOT & MONEUSE CO., E. E. ALLEY CO., INC., AND H. B. DAY CO., INC.,
Petitioners,

vs.

FRYSINGER EVANS, DU-WEL CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC. AND GRAMERCY QUALITY LAUNDRY CO., INC.,
Respondents.

BRIEF IN SUPPORT OF PETITION.

Statement.

Under subdivision (a) of §77B three creditors having claims in the jurisdictional amount may file a petition under the section, if the corporation is insolvent, or unable to meet its debts as they mature, in any one of three alternative situations: (1) if the corporation has committed an act of bankruptcy within four months, (2) if a prior

proceeding in bankruptcy is pending, and (3) if an equity receivership is pending.

The single question presented here is whether the custody of the debtor's property by receivers appointed by a State court in a suit in equity to foreclose a mortgage is a pending equity receivership within the meaning of §77B.

The district court held that it was not, and dismissed as insufficient in law a petition for corporate reorganization setting forth the existence of such a receivership but not alleging the pendency of a prior proceeding in bankruptcy or an act of bankruptcy. Its opinion, dated May 8, 1935, is found in the record (R. 17-19), and is reported 11 Fed. Supp. 404. The Second Circuit Court of Appeals affirmed the district court. Its opinion, dated July 15, 1935, is printed in the record (R. 30-34), and is reported 78 F. (2d) 678.

The date of the judgment of the Circuit Court of Appeals for the Second Circuit to be reviewed by this Court is July 22, 1935 (R. 34, 35). The allegations of the petition for reorganization, which was dismissed as insufficient in law, are summarized in the petition for certiorari.

The decision of the Second Circuit Court of Appeals is in conflict with that of the Seventh Circuit Court of Appeals in *Matter of Granada Hotel Corporation*, a case decided June 5, 1935, in which a rehearing was denied July 26, 1935. The opinion of that court is reported 78 F. (2d) 409. This decision affirmed the District Court for the Eastern District of Illinois which had sustained the petition for reorganization. The opinion of the district court, dated February 26, 1935, is reported 9 Fed. Supp. 909. The unsuccessful parties in that case are also applicants for certiorari here (No. 428).

ARGUMENT.

The custody of the debtor's property by receivers appointed by the State court in a suit in equity to foreclose a mortgage is a pending equity receivership within the meaning of Section 77B.

I. THE LANGUAGE OF THE STATUTE IMPERATIVELY REQUIRES THAT THE PRESENT RECEIVERSHIP BE HELD AN EQUITY RECEIVERSHIP.

The expression "equity receivership * * * pending," which governs this case, is not difficult or obscure. If the words are to be used in their literal significance, the logical content of the phrase cannot include more than this: (1) appointment of receivers in a suit in equity, (2) appointment of receivers by an exercise of chancery rather than statutory powers, and (3) present possession of the *res* by the receivers. While it may very well be that the statute is satisfied by the existence of less than all of these conditions, it cannot be said without a violation of language that custody of the property of a corporation by a receiver appointed in an exercise of chancery powers in a suit in equity is not an equity receivership.

A. The Present Pending Foreclosure Receivership Satisfies the Literal Requirements of the Statute.

It cannot be doubted that a suit to foreclose a mortgage is a suit in equity. Nor can it be doubted that the appointment of receivers in such a foreclosure suit is the exercise of chancery powers. It is said in Carmody's New York Practice, Vol. 8, § 1023:

> "Receivers may be appointed in foreclosure actions, but, if appointed, they are the regular equity receivers."

The author refers the reader by a footnote to Vol. 7, § 584, where it is said:

> "These receivers were appointed by the courts of chancery before any statutes were passed authorizing their appointment, and the cases in which such receivers might be had and the rules regulating their appointment and governing their conduct were well settled before the Code of Civil Procedure was adopted in 1849. The Code provisions merely codified those well-established rules, and the Civil Practice Act sections continue the law as found in the Code."

The petition alleged in the present case (R. 4) that the receivers have entered into possession, that the receivership is now in full force and effect and has not been revoked or terminated (R. 4-5), and that the debtor's "only property" is being administered by the receivers in the foreclosure suit (R. 16).

The receivership in this New York foreclosure suit thus meets all of the possible requirements of the language used in the statute.

B. The Language Is Unambiguous and Does Not Admit of Construction.

The court below has obviously added restrictions to the foregoing concept of an equity receivership by an exercise of a purported power to construe the statute. The statute, however, being unambiguous, has left no room for construction.

In *United States* v. *Mo. Pac. R. Co.* (1929), 278 U. S. 269, this Court in refusing to cut down the meaning of general language employed in the Interstate Commerce Act, which was contended to have a more restricted meaning, said (p. 277):

> "Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by

> the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction."

And again (p. 278):

> "But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."

As it was put by Sutherland, J., in *Crooks* v. *Harrelson* (1930), 282 U. S. 55, 60:

> "* * * the absurdity must be so gross as to shock the general moral or common sense. Compare *Pirie* v. *Chicago Title and Trust Company,* 182 U. S. 438, 451-452. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. *Treat* v. *White,* 181 U. S. 264, 268."

C. Where Words of General Application Are Used the General Meaning Is Preferred to a Restricted Meaning.

Even if it be agreed that the words "equity receivership * * * pending" are subject to interpretation, the applicable canons of construction are opposed to the restriction sought to be made.

The rule is thus expressed in *Mears Mining Co.* v. *Maryland Casualty Co.,* (1912) 162 Mo. App. 178, 144 S. W. 883, 887:

> "If the statute did not expressly name any kind of insurance, but used general words, then it would cover all kinds of insurance contracts, as the rule is well established that where a statute contains general words only such general words are to receive a general construction, and the effect of them is not to be limited except by express words of the statute itself."

The rule that the wide is preferred to the narrow construction also finds expression in *Tynan* v. *Walker*, (1868) 35 Calif. 634, 642; *Abbot* v. *City of Milwaukee, et al.*, (1912) 148 Wis. 26, 134 N. W. 137; *So. Ry. Co.* v. *Machinist Local Union No. 14*, (C. C. W. D. Tenn. 1901) 111 Fed. 49, 56, 57.

The matter was thus put by the Supreme Court in *Miller* v. *Robertson*, (1924) 266 U. S. 243, 250, in holding, per Butler, J., that suits under § 9 of the Trading with the Enemy Act were not to be limited to causes of action for which an action of debt might be maintained:

> "The words of a statute are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears."

Caffey, J., said in *In re David Bell Scarves* (D. C. S. D. N. Y. 1931), 52 F. (2d) 755, 756; affirmed as *Conrad* v. *Pender*, 289 U. S. 472:

> "There must be plain and strong ground for depriving language of a statute of full operation before the court is justified in confining it to a field more restricted than that comprehended within the literal words."

D. The Legal Meaning of the Words Used Is to be Preferred to a Colloquial or Local Meaning.

Judge Swan, writing for the court below, says of the words "equity receivership" (R. 32):

> "The kind of suit to which those words are usually applied in common parlance is one commenced by a simple contract creditor praying for the conservation of the assets of a corporation insolvent in the common law sense, in which the corporation confesses the allegations of the bill and consents to the appointment of a receiver."

The reference of the court is to the "conservation" suit which, based upon an equitable estoppel upheld in *Brown* v. *Lake Superior Iron Co.* (1890), 134 U. S. 530, received a certain amount of judicial recognition in *Re Metropolitan Railway Receivership* (1908), 208 U. S. 90, was condemned as irregular in *Harkin* v. *Brundage* (1928), 276 U. S. 36, and is given some place as a suit in which an equity receiver may be appointed in *Gordon* v. *Washington* (1935), 295 U. S. 30, 79 L. Ed. 626, 631.

But the use of the words "equity receivership" as limited to this irregular and eccentric type of proceeding in the federal courts is obviously a colloquialism. Furthermore, as pointed out in the case of *In re Laclede Gas Light Co.* (D. C., E. D. Mo. 1934 not officially reported, C. C. H. Bankruptcy Law Service, Par. 3001), this type of proceeding, except as to railroads, has been limited to the eastern seaboard. Words having a definite legal significance when used in a statute of national application should not be assigned a colloquial meaning, and still less a meaning unknown in a portion of the country over which the statute is to operate.

As was said in *Westerlund* v. *Black Bear Mining Co.* (8th C. C. A. 1913), 203 Fed. 599, 605:

> "A decisive canon of construction here, however, is that when a word which has a known legal meaning is used in a statute it must be assumed that the term is used in its legal sense, in the absence of an indication of a contrary intent. *The Abbotsford,* 98 U. S. 440, 444, 25 L. Ed. 168; *McCool* v. *Smith,* 1 Black (U. S.) 459, 464, 470, 17 L. Ed. 218; *United States* v. *Gilmore,* 8 Wall. 330, 19 L. Ed. 396."

II. THE REASONS OF THE COURT BELOW FOR REJECTING THE LITERAL AND LEGAL MEANING OF THE WORDS "EQUITY RECEIVERSHIP * * * PENDING" ARE INVALID.

A. Resort to the Congressional Debates is Improper.

The learned court below concedes that it is rejecting the literal meaning of the statute and accepting a colloquial one. It says (R. 32, 33):

> "It cannot be gainsaid that an action to foreclose a mortgage is a suit in equity, or that the receiver appointed in such a suit to conserve the mortgaged property and collect the rents pending foreclosure may properly be called a receiver in equity."

Nevertheless, the Court limits the generality of the statute to the equity receivership found in a single type of proceeding, the "conservation suit", because "the debates in Congress during the progress of the bill, although not affording any conclusive evidence of the meaning of the words in question, indicate that the legislators were thoroughly familiar with this type of receivership. See 78 Cong. Rec. 7890, 7905-7" (R. 33). But resort to such an external source for the meaning of words which are unambiguous and have an accepted legal significance is a violation of the rule established by decisions of this Court.

In *Caminetti* v. *United States* (1917) 242 U. S. 470, 490, it was said by Day, J. (p. 490):

> "But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See *Mackenzie* v. *Hare*, 239 U. S. 299, 308."

The following extract from the opinion of McKenna, J., in *Mackenzie* v. *Hare*, (1915) 239 U. S. 299, 308, is most pertinent:

> "The act is therefore explicit and circumstantial. It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate.
>
> "Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language, or, rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others."

To the same effect are *Pennsylvania Railroad Company* v. *International Coal Company* (1913) 230 U. S. 184, 199; *United States* v. *Freight Association* (1897) 166 U. S. 290, 318; *United States* v. *Mo. Pac. R. Co.* (1929) 278 U. S. 269, 278.

B. The Argument That the Equity Receivership Contemplated Is Only Such as Is Similar to a Proceeding in Bankruptcy Is Invalid.

The language is "if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months" (Subd. a, § 77B).

The Circuit Court of Appeals (R. 33), as did the District Court (R. 18), rested its decision upon the supposed use of the words under interpretation in apposition to " a prior proceeding in bankruptcy". The word "prior", however,

modifies "proceeding in bankruptcy" alone. Its use obviously is to distinguish between an earlier bankruptcy proceeding and the reorganization proceeding itself, which, being brought under the bankruptcy act, is also a "proceeding in bankruptcy."

There is, moreover, no such thing as "a *proceeding* in equity receivership". A suit that looks merely to the appointment of an equity receiver must be dismissed. *Gordon* v. *Washington* (April 1, (1935) 295 U. S. 30, 79 L. Ed. 626; *U. S.* v. *Sloan Shipyards* (D. C. W. D. Wash. N. D. 1920) 270 Fed. 613; *Central West Public Service Co.* v. *Craig* (8th C. C. A. 1934) 70 F. (2d) 427, 432; *Zuber* v. *Micmac Gold Mining Co.* (C. C. Me. 1910) 180 Fed. 625, 627.

In the case first cited this Court said, per Stone, J. (p. 37):

> "A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself. Where a final decree involving the disposition of property is appropriately asked, the court in its discretion may appoint a receiver to preserve and protect the property pending its final disposition."

In the *Central West* case, *supra*, the Eighth Circuit Court of Appeals said (p. 432):

> "The appointment of a receiver is an ancillary, an incidental remedy only, and is not final relief nor is it properly the end or object of the litigation, but is a remedy allowable only in connection with a suit pending for some other purpose in which there is a prayer for ultimate relief which the court has jurisdiction to grant, and to which the appointment of the receiver is an aid."

Equity receiverships do not differ as between themselves. They can only be classified with reference to the primary objects of the bills to which they are auxiliary, and to the ultimate relief sought. While the order appointing one receiver may give powers denied to another for the purpose of accomplishing some object of the suit, or some necessity of the situation, there is no "quality" (to use the language of the District Court, R. 17) possessed by one receiver that is not possessed by all. They all hold the *res pendente lite* for the ultimate determination of its disposition by the court.

Hence the word "proceeding" cannot be attached to the words "equity receivership," and it cannot be said that the statute is limited to "a prior proceeding in equity receivership" which is to be assimilated to "a prior proceeding in bankruptcy." The only words to be interpreted are "equity receivership * * * pending."

In *Bryan* v. *Welch* (10th C. C. A. 1935) 74 F. (2d) 964, the receivership was not for the purpose of winding up the affairs of the corporation, but for temporarily operating the business, and it was expressly directed by the court when the receiver was appointed, that the assets be turned over to the new corporate management when a suitable one was established. Although not for liquidation and not an act of bankruptcy, the court, by Phillips, C. J., said (p. 970):

> "We conclude that the State court receivership was an equity receivership within the meaning of 77B."

The Tenth Circuit, therefore, must be aligned with the Seventh rather than the Second upon the present question.

C. ADHERENCE TO THE LEGAL AND LITERAL MEANING OF THE STATUTE DOES NOT LEAD TO ABSURD AND IMPRACTICAL CONSEQUENCES.

This is the only exigency in which departure from the accepted meaning of the statute's terms is permissible.

United States v. *Mo. Pac. R. Co., supra;*

Echols v. *Commissioner of Internal Revenue* (8th C. C. A. 1932) 61 F. (2d) 191;

The Samuel E. Spring (D. C. D. Mass. 1886) 27 Fed. 764, 766;

Farmers Loan & Trust Company v. *Oregon & C. Ry. Co.* (D. C. D. Ore. 1885) 24 Fed. 407, 410;

Chicago Home for Girls v. *Carr* (1921) 300 Ill. 478, 483, 133 N. E. 344, 346-347.

"The absurdity must be so gross as to shock the general moral or common sense." *Crooks* v. *Harrelson, supra.*

The opinion below argues (R. 33):

> "We cannot think that Congress intended to give three creditors having claims totaling as little as $1,000, the right to force a corporation into a reorganization, if a receiver were appointed in the foreclosure of a mortgage covering any of its property. Situations may well be imagined in which a corporation might allow a mortgage on part of its land or on a chattel to be foreclosed, with the appointment of a receiver pending foreclosure, without being in any need of a reorganization. We do not believe that it was the purpose of Congress to permit every foreclosure proceeding in which a receiver might be appointed to be superseded by an involuntary reorganization."

This argument, however, completely ignores other provisions of the statute. If "equity receivership" is given its literal and legal meaning that does not permit "every fore-

closure proceeding in which a receiver might be appointed to be superseded by an involuntary reorganization." Such a result can follow only if the corporation is (1) insolvent, or (2) unable to meet its debts as they mature, and if the petition is filed in good faith (Section 77B, subd. a). With these safeguards against the haphazard or unscrupulous use of the involuntary petition for reorganization, there is no reason why the right to file such a petition should not follow the existence of a mortgage foreclosure receivership. The foreclosure of any portion of a corporation's property is usually a symptom of financial distress. When accompanied by the corporation's insolvency or inability to meet its debts as they mature, the creditors of the corporation should be permitted to avert the disaster and set in motion the machinery of reorganization. They should not be left to the mercy of the debtor's own board of directors which through deadlock, lack of direct interest, ulterior motives or mere indolence, may be unable or unwilling to help them. At least the existence of such a remedy is not so absurd as to shock the general moral or common sense.

III. THE STATUTE FURNISHES ITS OWN DEFINITION OF "EQUITY RECEIVERSHIP • • • PENDING," WHICH IS IN ACCORD WITH THE LITERAL MEANING AND FULL OPERATION OF THOSE WORDS.

Subdivision (i) quoted above, provides expressly that a petition may be filed under this section by the corporation's creditors "as provided in subdivision (a) of this section," "if a receiver or trustee of all or any part of the property of a corporation has been appointed by a federal, state or territorial court." This language is also plain and unambiguous, and affords to the creditors a right to petition under the section: (1) whether the appointment

is over all, or only a part of the property, and (2) whether the appointment is by a federal, state or territorial court. This plain language precludes the interpretation that the appointment of a receiver of the property in foreclosure is not within the statute, or that the statute must be limited to a receivership pending in the federal court (as respondents contended in the district court).

True, the petition may be filed "as provided in subdivision (a)." The fair interpretation of this phrase is that to the requirement of the "pending" receivership, defined by this subdivision, must be added the other requirements of subdivision (a), to wit: that the creditors shall be three in number, that their claims aggregate $1,000, and that the corporation shall be either insolvent or unable to meet its debts as they mature. It cannot be said that the provision that a petition may be filed "as provided in subdivision (a)" also requires the allegation of an act of bankruptcy or the existence of a prior proceeding in bankruptcy, or of the pendency of an equity receivership other than as defined in subdivision (i). The words quoted above from subdivision (i) would, under such construction, be bereft of all significance and might as well be stricken from the statute as redundant.

The learned court below considered this provision of subdivision (i) "contemplates a situation where the corporation may have property outside the jurisdiction of the appointing court, in which case only part of its property could be in equity receivership without ancillary proceedings" (R. 34).

But if all that Congress meant was that the creditors might petition if an equity receivership existed in another jurisdiction, it would have been easy enough to say "if a receiver or trustee of the property of a corporation has been appointed in any jurisdiction by a federal, state or

territorial court." Congress, however, did not say that. It said "if a receiver or trustee of all or any part of the property of a corporation has been appointed by a federal, state or territorial court." The universality of the latter proposition, under the authorities already cited, cannot be limited to the narrow confines of the former. Certainly it cannot be so done without good reason. Besides, conservation suits are ordinarily commenced where the principal office of the corporation is situated, and so ordinarily are reorganization proceedings. The language in question can hardly be construed as having been adopted merely for the purpose of enabling creditors to institute the reorganization proceedings in a jurisdiction other than that in which the equity receivership or the conservation suit is pending.

IV. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS RESTS UPON A MORE LOGICAL BASIS.

The decision of the Second Circuit Court of Appeals below is exactly the opposite of the decision of the Seventh Circuit Court of Appeals in *In re Granada Hotel Corporation* (June 5, 1935), 78 F. (2d) 409, which affirmed the decision of the District Court for the Eastern District of Illinois (February 26, 1935) 9 Fed. Supp. 909. That case, in which an application for certiorari has also been made to this Court (No. 428), includes an additional question not involved here, *i. e.;* whether custody of the property under order of the court by a mortgage trustee, and not by a receiver selected by the court, constitutes a receivership.

The opinions both of the Circuit Court of Appeals and of the district court in that case give more emphasis to that feature of the case. They plainly show, however, that the instant question not only was necessarily decided but

was considered by both courts. Indeed, in an application for rehearing to the Circuit Court of Appeals the decision below was urged as a reason for change in its decision. Rehearing, however, was denied on July 16, 1935.

The views of Judge Lindley, whose decision was affirmed, are clearly set forth in another case, *Matter of Surf Building Corporation* (D. C., E. D. Ill., October, 1934, not officially reported), C. C. H. Bankruptcy Law Service, Paragraph 3076, where he said in part:

> "It may be well to comment upon one or two contentions submitted by the respondents. It is insisted that an equity receivership, growing out of a foreclosure proceeding which vests in the receiver of a court of equity the custody and possession of all the assets of the corporation, is not an equity receivership within the meaning of the statute. I have already said in other cases, probably so often as justly to be accused of tiresome reiteration, that a receivership in equity is always incidental to some other ultimate purpose; that equity jurisprudence recognizes no such proceedings as one which has for its only prayer for relief, receivership, but that all receivers in equity are appointed, whether in dissolution of partnerships, in mortgage foreclosure or upon creditors' petition, in subordination of and incidental to the main purpose of the litigation. This court is of the opinion that Congress did not intend, by the provisions of 77-B, to limit jurisdiction under that section to equity receiverships other than those in foreclosure cases. To do so would be to defeat the purpose of the Act in a very important branch of equity jurisdiction."

Respondents below relied upon *In re Laclede Gas Light Co.* (D. C., E. D. Mo. June 26, 1934, not officially reported) C. C. H. Bankruptcy Law Service, Paragraph 3001. Certain remarks there are in accordance with the decision reached below. They were not at all necessary, however,

to the decision, since in that case it appeared that no receiver whatever had been appointed at the time the petition for reorganization was filed. This also was the situation in *In re Broadway-Barclay Corporation* (2d C. C. A. July 15, 1935) 78 F. (2d) 680, decided by the court below simultaneously with its decision herein. For the reason stated, these cases are plainly distinguishable.

The other decision in the District Court for the Southern District of New York, *In re Draco Realty Corporation* (June 3, 1935) 11 Fed. Supp. 405, was rendered after the decision in the District Court below and was, therefore, compelled by the rule *stare decisis*.

The decisions of Judge Lindley in *In re Flamingo Hotel Co.* (August 9, 1934, not officially reported) and *In re Surf Building Corporation, supra,* support this brief.

V. THE WORDS "EQUITY RECEIVERSHIP" SHOULD NOT BE JUDICIALLY RESTRICTED.

A. This Is a Remedial Statute Requiring a Liberal Construction to Accomplish the Relief Intended by Congress.

The National Bankruptcy Act as a whole must be construed liberally. In *Continental Ill. Nat. B. & T. Co.* v. *C. R. I. & P. R. Co.* (1935) 294 U. S. 648, 668, 79 L. Ed. 642, 651, this Court in dealing with the companion § 77 said, per Sutherland, J.:

> "From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power."

In dealing with § 77B itself, the Fourth Circuit Court of Appeals in *Campbell* v. *Allegheny Corporation* (1935) 75 F. (2d) 947, 950, said, per Parker, C. J.:

> "The statute is of a remedial character, designed to facilitate the reorganization of corporate business made necessary by the economic depression through which the country has been passing. Its purpose should be forwarded by a fair and liberal construction of its provisions, not thwarted by any narrow or technical interpretation, and certainly not by reading into its language conditions and limitations which the lawmakers themselves did not see fit to express."

B. A Purpose of the Statute Was to Enable the Debtor and Its Creditors to Avoid, if Possible, the Sacrifice and Expense Involved in Foreclosure Sales.

In upholding the constitutionality of the companion section, § 77, the Supreme Court in *Continental Ill. Nat. B. & T. Co.* v. *C. R. I. & P. R. Co.* (1935) 294 U. S. 648, 685, 79 L. Ed. 642, 660, said:

> "The delay and expense incident to railroad receiverships and foreclosure sales constituted, probably, the chief reasons which induced the passage of § 77; and to permit the perpetration of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted."

Something of the same thought with relation to § 77B was expressed by Judge Lindley in his decision in the *Granada* case, 9 Fed. Supp. 909, which was affirmed by the Seventh Circuit Court of Appeals:

> "As the court has previously pointed out, the intent of Congress apparently was to give the holders of bonds in default an opportunity to have property securing their bonds reorganized in the federal court in lieu of liquidation under foreclosure in either the state or federal court."

If it was the intention of Congress to permit the holders of bonds in default to avoid the expense of foreclosure by having their property reorganized under § 77B, *a fortiori* it is the right of general creditors, whose equities in a valuable property will be wiped out by the sale of the property under a small mortgage, to have the court assume jurisdiction, and thus to have an opportunity to seek to finance the mortgage and to prevent its foreclosure. This does not lead to any unjust, oppressive or absurd result. On the contrary, it affords an opportunity which is just, fair and reasonable.

The argument of the court below comes down to this, that an equity receivership of the entire property of the debtor is an "equity receivership" if the ultimate purpose of the suit is a ratable distribution of the assets among the creditors secured and unsecured, but it is not an "equity receivership" if the ultimate object is the application of the property to the satisfaction of a secured creditor or, as often happens in the case of mortgage bonds, a class of secured creditors. It is impossible to discern any legislative purpose in such a distinction. Surely the legislature could not have intended that creditors could interrupt the course of a proceeding seeking a ratable distribution of the assets among all creditors and could not interrupt the sacrifice of the property in the interest of one secured creditor or class of creditors.

Conclusion.

The literal and legal meaning of "equity receivership * * * pending" does not involve any particular ultimate relief. It is merely the description of a condition which may exist in many types of equity suits in which, pending ultimate disposition, the court has temporarily placed the property of the debtor in the hands of its custo-

dian. Departure from the literal and legal meaning of "equity receivership * * * pending," in favor of a local, colloquial or otherwise restricted meaning can only be justified if adherence to the literal and legal meaning involves oppression, injustice or absurdity. In the present case it is the restricted and colloquial meaning which involves injustice and absurdity, and the literal and legal meaning which is in accord with the purposes of the act, and with the liberal construction to which it is entitled as a remedial statute. The view of the Circuit Court of Appeals for the Seventh Circuit should be accepted.

A WRIT OF CERTIORARI SHOULD BE GRANTED, AND THIS COURT SHOULD REVIEW THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND FINALLY REVERSE IT.

Dated, New York, October 15, 1935.

Respectfully submitted,

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(7016-C)